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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ROBERT MALLORY, KAREN MALLORY and ALAN WILLEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

V.

MCCARTHY HOLTHUS, LLP,

Defendant.

Case No.: 2:14-cv-00396-KJD-VCF

**PLAINTIFFS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT**

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I. INTRODUCTION

This case arises out of McCarthy Holthus LLP's ("Defendant") attempt to collect a post-default debt against Plaintiffs. Defendant seeks dismissal of Plaintiffs' First Amended Complaint, arguing that Defendant is not a debt collector and therefore not subject to the FDCPA. However, Defendant is a debt collector, as Defendant attempted to collect payment of money due or owing to another. FAC ¶ 14, 22. Defendant further argues that since Defendant must comply with a state statute (NRS 107), it could not have violated the FDCPA. This is patently false, and as the FDCPA clearly states, compliance with both the FDCPA and state law is required. Should a conflict arise, the FDCPA preempts any conflicting state law. *See* 15 U.S.C. § 1692n.

On or about December 10, 2013, Defendant sent a debt collection letter to Plaintiffs ROBERT MALLORY and KAREN MALLORY. FAC ¶ 24. On or about June 22, 2013, Defendant sent a debt collection letter to Plaintiff ALAN WILLEY. FAC ¶ 47. Each of Defendant's letters to Plaintiffs stated that Defendant could be a debt collector.¹² Yet surprisingly, throughout its Motion, Defendant impermissibly argues that it is not a debt collector, in direct contradiction with the factual

¹ Defendant's June 22, 2013 letter to ALAN WILLEY states: **NOTICE: THIS MAY BE CONSIDERED AS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

² Defendant's December 10, 2013 letter to ROBERT MALLORY and KAREN MALLORY states: **NOTICE: THIS OFFICE MAY BE CONSIDERED A DEBT COLLECTOR AND THIS MAY BE CONSIDERED AS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

1 allegations in Plaintiffs' First Amended Complaint. Not only is Defendant's
2 contention misplaced in a 12(b)(6) motion, but it is patently false, as evidenced by
3 its own collection letters claiming Defendant *may be a debt collector attempting to*
4 *collect a debt.*

5
6 As will be discussed fully herein, Defendant's motion to dismiss should be
7 denied in its entirety because 1) Defendant is a debt collector subject to the
8 FDCPA; 2) Defendant was collecting a debt, not enforcing a security interest; and
9 3) Defendant's compliance with the requirements of NRS 107 do not relieve
10 Defendant of its responsibility of FDCPA compliance as a debt collector.
11 Accordingly, Defendant's motion should be denied in its entirety. In the
12 alternative, Plaintiff respectfully requests leave to amend any deficiencies this
13 Court may find with its First Amended Complaint.
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16 **II. LEGAL STANDARD FOR MOTION TO DISMISS**

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18 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain
19 statement of the claim showing that the pleader is entitled to relief," in order to
20 "give the defendant fair notice of what the ... claim is and the grounds upon which
21 it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Bell*
22 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 [127 S.Ct. 1955, 1964, 167 L.Ed.2d
23 929] (2007). A well-pleaded complaint may proceed even if it appears "that a
24 recovery is very remote and unlikely." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94
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1 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
 2 1949 (2009), noted:

3
 4 *Twombly* does not require a court at the motion-to-dismiss stage
 5 to consider whether the factual allegations are probably true. We
 6 made it clear, on the contrary, that a court must take the
 7 allegations as true, no matter how skeptical the court may be. See
 8 *Twombly*, 550 U.S., at 555, 127 S.Ct. 1955 (a court must proceed
 9 “on the assumption that all the allegations in the complaint are
 10 true (even if doubtful in fact)”; *id.*, at 556, 127 S.Ct. 1955 (“[A]
 11 well-pleaded complaint may proceed even if it strikes a savvy
 12 judge that actual proof of the facts alleged is improbable”); see
 13 also *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104
 14 L.Ed.2d 338 (1989) (“Rule 12(b)(6) does not countenance ...
 dismissals based on a judge's disbelief of a complaint's factual
 allegations”). The sole exception to this rule lies with allegations
 that are sufficiently fantastic to defy reality as we know it: claims
 about little green men, or the plaintiff's recent trip to Pluto, or
 experiences in time travel. That is not what we have here.

15 *Id.*

16 The Court must draw all reasonable inferences in favor of the plaintiff. *See*
 17 *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir.2009).
 18

19 **III. DEFENDANT WAS COLLECTING A DEBT**

20 Defendant asserts in its Motion that Defendant was not trying to collect a
 21 debt. Yet Defendant's letters explicitly state they could be considered debt
 22 collectors attempting to collect a debt. Further, the letters state, "We are writing
 23 to let you know that your mortgage loan payment is past due, ... You may be able
 24 to avoid foreclosure by, among other alternatives, *paying the total amount*
 25 *necessary to bring the account current.*" (emphasis added). Defendant's letter to
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1 ALAN WILLEY³ goes on to state, "[t]he **total amount needed** to reinstate and
 2 avoid the foreclosure **is \$16,832.68** as of the date of this letter. Please note: These
 3 amounts are subject to change. Please call us at one of the telephone numbers
 4 listed below for the most current amount." (emphasis added). Defendant's letters
 5 are the absolute definition of debt collection. The letters attempt to collect an
 6 amount owed by demanding a payment.
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8
 9 Defendant makes an attempt to frame its letters as non-judicial foreclosure
 10 activity, which Defendant argues is exempt from the FDCPA. Defendant makes
 11 the argument that "even absent the requirement of NRS 107.080, enforcement of
 12 rights in property securing a debt, in this instance a deed of trust, does not
 13 constitute collection of a debt under the general provisions of the FDCPA..."
 14 Def.'s Motion, p. 3, ln. 11-13. Defendant's argument fails on its face, however,
 15 because Defendant is not merely foreclosing in these letters to Plaintiffs. "A
 16 'foreclosure' is '[t]he sale of mortgaged property, authorized by a court decree or
 17 a power-of-sale clause, to satisfy the debt.' SALE, Black's Law Dictionary (9th
 18 ed. 2009). Foreclosures may be "judicial" or "non-judicial." A sale pursuant to a
 19 court decree is called a "judicial foreclosure." FORECLOSURE, Black's Law
 20 Dictionary (9th ed. 2009)." *Rahoi v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist.
 21 LEXIS 83571, 9 (N.D. Cal. June 12, 2013). Collecting money owed on a
 22 mortgage is debt collection, it is not a "foreclosure."
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 28 ³ Defendant's letter to Plaintiffs ROBERT MALLORY and KAREN MALLORY states, "the
 total amount to reinstate and avoid foreclosure is \$96,437.03 as of the date of this letter."

1 Defendant's letters to Plaintiffs seek to *collect money* from the Plaintiffs,
2 which is exactly the type of activity that the FDCPA regulates. Moreover,
3 Defendant's letters, even if attempting to enforce a security interest, also attempt
4 to collect a debt. Finally, foreclosure activity, which Defendant wrongfully asserts
5 is all that took place in its letters to Plaintiffs, can be debt collection activity
6 subject to the FDCPA. As such, Defendant's Motion must be denied.
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9 **A. Plaintiffs' alleged debts are "debts" within the meaning ascribed**
10 **by the FDCPA**

11 First, Plaintiffs' alleged payment obligations fall within the definition of a
12 "debt" under 15 U.S.C. § 1692a(5). *See Reese v. Ellis Painter Ratterree Adams*
13 *LLP*, 678 F.3d 1211, 1216 (11th Cir. 2012) ("[The term "debt"] clearly
14 encompasses the Reeses' payment obligations under the promissory note at issue
15 in this case. Under that promissory note, the Reeses are consumers who must pay
16 money to [defendant], and their obligation to do so arose from a transaction
17 involving property that is primarily for the Reeses' personal, family, or household
18 purposes (they live on the property)). *See also Bourff v. Rubin Lublin, LLC*, 674
19 F.3d 1238, 1241–42 (11th Cir.2012) (treating a letter requesting payment on a
20 promissory note secured by a mortgage as "an attempt at debt collection" within
21 the meaning of the FDCPA); *see also Kojetin v. C U Recovery, Inc.*, 212 F.3d
22 1318, 1318 (8th Cir.2000) (per curiam) (treating a promissory note signed in
23 connection with a car loan as a debt within the meaning of the FDCPA).
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28 Here, as plead in Plaintiffs' First Amended Complaint, Plaintiffs' alleged

debts arose out of their obligations to pay a loan that was primarily for Plaintiffs' personal, family, or household purposes, since they, like the Reeses, lived on the properties in question. Thus, Plaintiffs' alleged debts are "debts" as defined by 15 U.S.C. § 1692a(5).

B. Letters seeking to enforce a security interest that also seek to collect a debt are subject to the FDCPA

When the defendant in *Reese* made the same argument that Defendant makes here – that Defendant's letters are not debt-collection activity because the purpose was simply to inform the Plaintiffs that Defendant intended to enforce its security interest through the process of non-judicial foreclosure – the court refused to accept the argument. In discussing, the *Reese* court stated:

In other words, we should ignore the language in the letter and documents that demands payment on the promissory note in favor of what the firm says was the purpose (of the firm or of the letter and documents it sent, or both). If we will do that, the firm argues, we will see that the letter and documents were not an attempt to collect a debt within the meaning of § 1692e but merely an attempt to enforce a security interest. *That argument wrongly assumes that a communication cannot have dual purposes...The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of § 1692e.*

The rule the Ellis law firm asks us to adopt would exempt from the provisions of § 1692e any communication that attempts to enforce a security interest regardless of whether it also attempts to collect the underlying debt. That rule would create a loophole in the FDCPA. A big one. *In every case involving a secured debt, the proposed rule would allow the party demanding payment on the underlying debt to dodge the dictates of § 1692e by giving notice of foreclosure on the secured interest.*

1 The practical result would be that the Act would apply only to
 2 efforts to collect unsecured debts. So long as a debt was
 3 secured, a lender (or its law firm) could harass or mislead a
 4 debtor without violating the FDCPA. *That can't be right. It*
 5 *isn't. A communication related to debt collection does not*
 6 *become unrelated to debt collection simply because it also*
 7 *relates to the enforcement of a security interest. A debt is still*
 8 *a "debt" even if it is secured.* (emphasis added).

9 *Reeses v. Ellis Painter Ratterree Adams LLP*, 678 F.3d 1211, 1216.

10 Thus, at a minimum, letters can both seek to enforce a security interest *and*
 11 collect a debt. Here, it is evident that Defendant's letters, even if they attempted to
 12 enforce a security interest, also served the purpose of debt collection (as the letters
 13 themselves state), and therefore are subject to the FDCPA. *See Reese v. Ellis*
 14 *Painter Ratterree Adams LLP*, 678 F.3d 1211, 1216. Because Defendant's
 15 collection letters are subject to the FDCPA, Defendant's Motion fails and must be
 16 denied.

17 **C. The case law that Defendant relies on its brief is of little use**

18 As already explained, Defendant was attempting to collect a debt rather than
 19 enforce a security interest. In Defendant's Motion, Defendant relies on an array of
 20 unpublished opinions that have no binding effect on this Court. In the unpublished
 21 decision of *Santoro v. CTC Foreclosure Service*, the defendant's letters were
 22 warnings to keep the payments current, and they did not seek to collect the debt as
 23 Defendant's letters do here. Moreover, the defendant, Countrywide, obtained the
 24 mortgage *before* default, exempting them from the FDCPA. Here, Defendant's
 25 attempted to collect the debts only *after* Plaintiffs defaulted. In *Mickelson v. Chase*
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1 *Home Finance LLC*, another unpublished decision, the defendant actually
2 conducted a non-judicial foreclosure on behalf of Chase. Such is not the case here,
3 as Defendant never initiated a foreclosure against ALAN WILLEY⁴, and no
4 foreclosure proceedings against ROBERT MALLORY and KAREN MALLORY
5 ever occurred. Instead, Defendant's letters were attempts to induce Plaintiffs'
6 payment of unpaid debts.
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9 Defendant also leans on a heavily criticized decision, *Hulse v. Ocwen Fed.*
10 *Bank FSB*, 195 F. Supp. 2d 1188 (D. Or. 2002). Defendant quotes *Hulse* at length
11 for the proposition that any action taken in pursuit of the foreclosure may not be an
12 FDCPA violation. One case that refuses to follow *Hulse* is *Castrillo v. Am. Home*
13 *Mortgage Servicing, Inc.*, 670 F. Supp. 2d 516, 523 (E.D. La. 2009). The court in
14 *Castro* determined that if a mortgage service company, and those acting on its
15 behalf, take the mortgage *after* default, then it is considered a debt collector. *Id.*
16 Here, Plaintiffs alleged that Defendant acquired the debts through assignment,
17 purchase, or other means after Plaintiffs allegedly defaulted. FAC, ¶ 23, 46.
18 Defendant offers nothing to rebut Plaintiffs' allegations that Defendant obtained
19 the alleged debts post-default. Thus, because Defendant obtained the alleged debts
20 post-default, Defendant is a debt collector subject to the FDCPA.
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25 In discussing whether foreclosure activity is included in the FDCPA, the
26 court in *Castrillo* had this to say:
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4 While a foreclosure was initiated later, it was by Quality Loan Servicing, not by Defendant.

Defendants rely on *Hulse v. Ocwen Fed. Bank, FSB*, 195 F.Supp.2d 1188, 1204 (D.Or.2002). *Hulse* held that foreclosure actions were not included in the definition of a “debt” under the FDCPA, and therefore creditors and attorneys who brought foreclosure proceedings were not “debt collectors.” *Id.* It reasoned that “[f]oreclosing on a trust deed is distinct from the collection of the obligation to pay money.... Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property.” *Id.* *Hulse's* reasoning has been expressly rejected by the Fifth Circuit. See *Kaltenbach*, 464 F.3d at 528 (finding that *Hulse* “misconstrues § 1692a(6)'s method of defining” debt collector); see also *Wilson*, 443 F.3d at 376 (“Defendant's argument, if accepted, would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt. We see no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods.”). In any event, Wells Fargo's involvement goes beyond simply initiating foreclosure proceedings. Counsel for Wells Fargo sent Castrillo a “Notice Pursuant to the Fair Debt Collection Practices Act” on January 20, 2009. (See R. Doc. 20–4, “Correspondence Between Plaintiff and Defendants”.) **As the letter itself states, “[t]his is an attempt to collect a debt”** in the amount of \$18,458.56. *Id.* Accordingly, defendants' reliance on *Hulse* is misplaced. (emphasis added).

Castrillo v. Am. Home Mortgage Servicing, Inc., 670 F. Supp. 2d 516, 523.

In *Vargas v. HSBC Bank USA, N.A.*, the Southern District of California drove home this very point in its analysis:

While the Ninth Circuit has yet to address the question [of whether the FDCPA covers foreclosure-related debt collection activities”] other circuit courts have. For example, ***the argument has been rejected by the Fourth Circuit.*** *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 378 (4th Cir. 2006) (defendants cannot benefit from § 1692a(6)(F)(i)'s exception to the definition of debt collector merely because they were trustees foreclosing on a property pursuant to a deed of trust). ***It has also been rejected by the Fifth Circuit.***

1 *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006)
2 ("We therefore hold that a party who satisfies § 1692a(6)'s
3 general definition of a "debt collector" is a debt collector for the
4 purposes of the entire FDCPA even when enforcing security
5 interests."); see also *Pizan v. HSBC Bank USA, N.A.*, 2011
6 U.S. Dist. LEXIS 66861 (W.D. Wash. June 23, 2011) ("In
7 asserting that QLS Corp. is not a 'debt collector' within the
8 meaning of the FDCPA, defendants rely on *Hulse v. Ocwen*
9 *Fed. Bank, FSB*. ***Hulse*, however, has been called into**
10 **question by two circuits and at least two district courts**
11 **within the Ninth Circuit.");** *Castrillo v. Am. Home Mortg.*
12 *Servicing, Inc.*, 670 F. Supp. 2d 516, 523-24 (E.D. La. 2009)
13 (same). The two circuit decisions are persuasive and apply here
14 to dispatch Defendants' argument. Therefore, Plaintiffs have
15 stated a plausible claim for relief and Defendants' motion to
16 dismiss this claim is denied. (emphasis added).

17 *Vargas v. HSBC Bank USA, N.A.*, 2012 U.S. Dist. LEXIS 128661, 16-17 (S.D.
18 Cal. Sept. 10, 2012).

19 Here, Defendant sent letters to Plaintiffs that go beyond initiating
20 foreclosure proceedings. Like in *Castrillo*, Defendant's letters plainly state that
21 the letters themselves are attempts to collect a debt. Defendant's use of "may be"
22 is no escape, since the confusing condition to render Defendant's letters as
23 informative rather than attempting to collect a debt requires Plaintiffs to be in
24 bankruptcy. That is simply not the case, as none of the Plaintiffs were in
25 bankruptcy or had their debts discharged through bankruptcy at the time of
26 Defendant's letters to Plaintiffs. Thus, it is evident that Defendant's letters were
27 attempts to collect alleged debts, and the letters correctly identified themselves as
28 such. Because Defendant's letters were attempts to collect a debt, Defendant's
were acting as debt collectors subject to the FDCPA, and Defendant's Motion

1 must therefore be denied.

2 **D. Foreclosure activity can be subject to the FDCPA**

3 As noted, *supra*, Defendant relies on *Hulse* for the proposition that
 4 foreclosure activity is exempt from the FDCPA. However, some circuits have
 5 expressly found foreclosure to fall within the FDCPA parameters. In *Glazer v.*
 6 *Chase Home Finance LLC*, 704 F.3d 453, 464 (6th Cir. 2013), the U.S. Sixth
 7 Circuit Court of Appeals followed the reasoning of *Reese* in stating “a home loan
 8 is a “debt” even if it is secured.”
 9

10 Moreover, the court elected not to follow the view adopted by the majority
 11 of district courts, and decided instead that mortgage foreclosure is debt collection
 12 under the FDCPA. *See id.* (“Thus, if a purpose of an activity taken in relation to a
 13 debt is to “obtain payment” of the debt, the activity is properly considered debt
 14 collection. *Nothing in this approach prevents mortgage foreclosure activity from*
 15 *constituting debt collection under the [FDCPA].*⁵ *Accordingly, mortgage*
 16 *foreclosure is debt collection under the FDCPA.*”) (emphasis added). The court in
 17 *Glazer* goes on to say, “[t]he [FDCPA] nowhere excludes from its reach
 18 foreclosure or the enforcement of security interests generally.” Thus, Defendant’s
 19 letters, even if attempting to initiate foreclosure proceedings or enforce a security
 20 interest, should be subject to the FDCPA because mortgage foreclosure is a
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27 ⁵ *See Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo.1992) (explaining that
 28 “foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt”).

1 “means” to collect a debt. *Id.* See also *Wilson v. Draper & Goldberg, P.L.L.C.*, 443
2 F.3d 373, 376 (4th Cir. 2006) (“[The] ‘debt’ remained a ‘debt’ even after
3 foreclosure proceedings commenced.”); see also *Romea v. Heiberger & Assocs.*,
4 163 F.3d 111, 117 (2d Cir. 1998) (holding that a notice sent in connection with
5 eviction proceedings was a communication related to debt collection because the
6 notice aimed “at least in part to induce [the debtor] to pay the back rent she
7 allegedly owed”).
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9

10 Other circuits have held along the same lines of *Glazer*. See *Gburek v. Litton*
11 *Loan Servicing LP*, 614 F.3d 380, 386 (7th Cir. 2010) (holding that a letter
12 threatening foreclosure while also offering to discuss “foreclosure alternatives”
13 qualified as a communication related to debt collection activity within the meaning
14 of § 1692e). Here, Defendant’s letters demanded payment but also offered
15 foreclosure alternatives such as “loan modification.” See Def.’s Motion, Exs. 1 and
16 2. In *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005), the
17 court held that a collection letter's threat to execute a lien if payment is not made
18 on a debt “does not change [the law firm's] communications to the [debtors] into
19 something other than an effort to collect that debt”. Here, Defendant’s letters
20 threaten foreclosure if payment to “reinstate” Plaintiffs’ accounts was not made.
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25 It is apparent Defendant was attempting to collect a debt, which is made
26 clear when Defendant demanded payment for “reinstatement,” and Defendant’s
27 own letters state Defendant was attempting to collect a debt. Because Defendant
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1 was trying to collect a debt from Plaintiffs, rather than enforce a security interest,
2 Defendant's Motion must be denied. Additionally, even if Defendant's letters were
3 considered attempts to enforce a security interest, case law shows the letters are
4 *still* subject to the FDCPA, and Defendant's Motion must therefore be denied.
5

6 **IV. DEFENDANT IS A DEBT COLLECTOR SUBJECT TO THE**
7 **FDCPA**

8 The FDCPA defines a debt collector as "any person...who regularly
9 collects or attempts to collect...debts owed or due or asserted to be owed or due
10 another." 15 U.S.C. §1692a(6). "The FDCPA regulates "debt collectors, " and
11 defines "debt collector" as "any person who uses any instrumentality of interstate
12 commerce or the mails in any business the principal purpose of which is the
13 collection of any debts, or who regularly collects or attempts to collect, directly or
14 indirectly, debts owed or due or asserted to be owed or due another." *Camacho-*
15 *Villa v. Great Western Home Loans*, 2011 WL 1103681 (3:10-CV-210-ECR-
16 VPC) (D. Nev., Mar. 23, 2011).
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20 Here, Defendant's argument that Defendant is not a debt collector flies in
21 the face of Defendant's own collection letters sent to Plaintiffs. First, as explained,
22 *supra*, Plaintiffs' alleged payment obligations are "debts" as defined by the
23 FDCPA. Additionally, as will be explained fully, *infra*, Defendant's own
24 collection letters state Defendant is attempting to collect a debt. Further,
25 Defendant's letters to Plaintiffs demanded payment to "reinstate" the accounts.
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27 Thus, Defendant's letters to Plaintiffs, demanding payment and identifying
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1 Defendant as attempting to collect a debt, are subject to FDCPA.

2 **A. Defendant's own collection letters identify Defendant as a debt**
3 **collector attempting to collect a debt**

4 Defendant's argument that it is not a debt collector is not only misplaced
5 and impermissible, but such an argument is disingenuous and borders on bad faith.
6 Defendant's letters to Plaintiffs attempted to collect a debt and stated that
7 Defendant could be a debt collector attempting to collect a debt. Plaintiffs
8 adequately plead this allegation in the First Amended Complaint. Thus, not only is
9 Defendant's contention that it is not a debt collector and not subject to the FDCPA
10 patently false, but such an argument lacks a shred of merit and is made in bad
11 faith. Defendant cannot escape that its own letters identify itself as collecting a
12 debt. Defendant's letter to ROBERT MALLORY and KAREN MALLORY
13 included the following:
14

17 **NOTICE: THIS OFFICE MAY BE CONSIDERED**
18 **A DEBT COLLECTOR AND THIS MAY BE**
19 **CONSIDERED AS AN ATTEMPT TO COLLECT**
20 **A DEBT AND ANY INFORMATION OBTAINED**
21 **WILL BE USED FOR THAT PURPOSE.**

22 Defendant's letter to ALAN WILLEY stated:

23 **NOTICE: THIS MAY BE CONSIDERED AS AN**
24 **ATTEMPT TO COLLECT A DEBT AND ANY**
25 **INFORMATION OBTAINED WILL BE USED**
26 **FOR THAT PURPOSE.**

27 "Under the law of this circuit, whether the initial communication violates the
28 FDCPA depends on whether it is "likely to deceive or mislead a hypothetical 'least

1 sophisticated debtor.’’ *Terran v. Kaplan*, 109 F.3d 1428, 1431-32 (9th Cir. 1997);
2 citing *Wade v. Regional Credit Ass’n*, 87 F.3d 1098, 1100 (9th Cir.1996) (quoting
3 *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th
4 Cir.1988)). The objective least sophisticated debtor standard is “lower than simply
5 examining whether particular language would deceive or mislead a reasonable
6 debtor.” *Swanson*, 869 F.2d at 1227. Under the objective least sophisticated
7 consumer standard, it is clear that Defendant’s notice in each letter identifies
8 Defendant as a debt collector, and Defendant is therefore subject to the FDCPA.
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11 To satisfy section 1692g's requirements, “the notice Congress required must
12 be conveyed effectively to the debtor. It must be large enough to be easily read and
13 sufficiently prominent to be noticed ... [and it] **must not be** overshadowed or
14 **contradicted by other messages or notices appearing in the initial**
15 **communication** from the collection agency.” *Id.* at 1225 (citation omitted)
16 (emphasis added). Defendant then states in its letters to Plaintiffs that if the
17 consumer went bankrupt, the letter is not a debt collection:
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21 **HOWEVER, IF YOU ARE IN BANKRUPTCY OR**
22 **HAVE BEEN DISCHARGED IN BANKRUPTCY,**
23 **THIS LETTER IS FOR INFORMATIONAL**
24 **PURPOSES ONLY AND IS NOT INTENDED AS**
25 **AN ATTEMPT TO COLLET A DEBT OR AS AN**
26 **ACTO TO COLLECT, ASSESS, OR RECOVER**
27 **ALL OR ANY PORTION OF THE DEBT FROM**
28 **YOU POERSONALLY.**

The notice stating Defendant may be collecting a debt is clearly contradicted

1 by the following notice where Defendant attempts to qualify its position as a debt
2 collector. The least sophisticated consumer would easily read such conflicting
3 notices and be confused about what Defendant is attempting to do. Moreover, the
4 logical inference of Defendant's disclaimer is that, if a debtor *is not* in bankruptcy,
5 or the debt has not been discharged through bankruptcy, then the letters *are*
6 *attempts to collect a debt*. Here, Plaintiffs were not in bankruptcy, nor were their
7 alleged debts discharged through bankruptcy when Defendant sent the respective
8 Plaintiffs the collection letters. Thus, it is crystal clear that Defendant is not only a
9 debt collector, but Defendant holds itself out to be a debt collector in its letters to
10 Plaintiffs since none of the Plaintiffs were in bankruptcy at the time of the letters.
11 Because Defendant is a debt collector, and the letters to Plaintiffs failed to comply
12 with the FDCPA, Defendant's Motion must be denied.

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17 **B. Defendant's collection letters demand payment of an alleged debt**

18 In addition to Defendant's letters identifying itself as a debt collector
19 attempting to collect a debt, Defendant cannot escape that its letters also demand
20 payment of the debt. Indeed, Defendant's letters to Plaintiffs read, "We are writing
21 to let you know that your mortgage loan payment is past due, ... You may be able
22 to avoid foreclosure by, among other alternatives, *paying the total amount*
23 *necessary to bring the account current*." (emphasis added) Def.'s Motion, Exs. 1
24 and 2. Each of the letters to Plaintiffs then states the "amount due" for the
25 respective debts. *See Romea v. Heiberger & Assocs.*, 163 F.3d 111, 117 (2d Cir.
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1 1998) (holding that a notice sent in connection with eviction proceedings was a
2 communication related to debt collection because the notice aimed “at least in part
3 to induce [the debtor] to pay the back rent she allegedly owed”).

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5 In *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005),
6 the court held that a collection letter's threat to execute a lien if payment is not
7 made on a debt “does not change [the law firm's] communications to the [debtors]
8 into something other than an effort to collect that debt”. Here, Defendant’s letters
9 threaten foreclosure if payment to “reinstate” Plaintiffs’ accounts was not made.
10
11 See also *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 386 (7th Cir. 2010)
12 (holding that a letter threatening foreclosure while also offering to discuss
13 “foreclosure alternatives” qualified as a communication related to debt collection
14 activity within the meaning of § 1692e).
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16
17 Because Defendant’s letters demanded payment to “reinstate” Plaintiffs, the
18 letters were attempts to collect a debt that are subject to the FDCPA. Therefore,
19 Defendant, who acted as a debt collector by sending the collection letters after
20 Plaintiffs defaulted, is subject to the FDCPA, and Defendant’s Motion must be
21 denied.
22

23 **V. DEFENDANT’S ATTEMPT TO COMPLY WITH NRS 107.080(3) IS**
24 **IRRELEVANT IN RELATION TO THE FDCPA**

25 Defendant attempts to divert this Court’s attention from the issue at hand,
26 which is Defendant’s failure to comply with the FDCPA in attempting to collect a
27 debt from Plaintiffs, by dedicating a portion of its Motion to explaining how
28

1 Defendant complied with NRS 107.080(3). Defendant argues that "[t]he notices,
2 however, did not violate either the FDCPA or the NDTPA. In fact, the notices
3 were required by Nevada law." Def.'s Motion, p. 2, ln. 19-20. This is a *non*
4 *sequitur*. Defendant's conclusion does not logically follow from the previous
5 argument or statement, as there is no reason why a debt collector cannot follow
6 both state law and the FDCPA. Further, if there was a conflict between state law
7 and the FDCPA, 15 U.S.C. § 1692n, entitled "Relation to State laws" makes it
8 clear that the FDCPA preempts any state law that is contrary:
9

11 This subchapter does not annul, alter, or affect, or exempt any
12 person subject to the provisions of this subchapter from
13 complying with the laws of any State with respect to debt
14 collection practices, except to the extent that those laws are
15 inconsistent with any provision of this subchapter, and then
16 only to the extent of the inconsistency. For purposes of this
17 section, a State law is not inconsistent with this subchapter if
the protection such law affords any consumer is greater than the
protection provided by this subchapter.

18 15 U.S.C. § 1692n

19 Defendant's argument is wholly irrelevant to the issues at bar, as Plaintiffs
20 have not alleged that Defendant failed to comply with NRS 107.080(3). Even if
21 Defendant complied with NRS 107, its letters to Plaintiffs did not comply with the
22 FDCPA, and that is the crux of this case. Only in the last sentence of its argument
23 in Defendant's Motion, does Defendant present an argument about whether or not
24 its letters violated the FDCPA. Defendant argues, "providing notice under NRS
25 107.080(3)(c) cannot be a violation of the FDCA, because the law requires it as
26 part of the non-judicial foreclosure process..." Def.'s Motion, p. 6, ln. 23 – p. 7, ln.
28

1 1. But as shown above, Defendant's assertion is patently false, as § 1692n does
 2 not relieve any party of the requirements under the FDCPA. And if there was a
 3 conflict, which the uncontroverted facts show there is none, federal law would
 4 preempt Nevada state law. Thus, Defendant's compliance with NRS 107.080(3) in
 5 no way affected its obligations under the FDCPA, and Defendant is therefore still
 6 subject to the FDCPA requirements.
 7

8 **VI. PLAINTIFFS ADEQUATELY PLEAD DEFENDANT'S** 9 **VIOLATIONS OF THE NDTPA**

10 Because Nevada is a notice-pleading jurisdiction, our courts liberally
 11 construe pleadings to place into issue matters which are fairly noticed to the
 12 adverse party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984); NRCP
 13 8(a); *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599, 584 P.2d 159, 160 (1978).
 14

15 Defendant argues in its Motion that Plaintiffs failed to plead the consumer
 16 fraud claim with particularity. Defendant first argues that only NRS 598.015(15)
 17 could apply to real estate transactions. First, this case does not turn on real estate
 18 transactions. Rather, this case is focused on Defendant's *debt collection* efforts.
 19 Second, even assuming *arguendo*, that this case did center on a real estate
 20 transaction, Plaintiffs plead, with particularity, Defendant's violation of NRS
 21 598.015(15). *See* Plaintiffs' FAC, ¶ 37 (By acting as a debt collector, ***demanding***
 22 ***repayment to "reinstate and avoid the foreclosure," and failing to include the***
 23 ***required notices under the FDCPA***, Defendant knowingly made a false
 24 representation as to Plaintiffs' rights and liabilities with regard to a transaction.
 25
 26
 27
 28

1 Thus, Defendant violated NRS 598.0915(15)) (emphasis added). Plaintiffs' First
2 Amended Complaint puts the Defendant on notice of the allegations with more
3 than sufficient particularity.

4
5 Plaintiffs' "consumer fraud" claim is also adequately plead. In a 2010
6 landmark decision, our Supreme Court in *Betsinger v. D.R. Horton*, 232 P.3d 433,
7 435 * 436, 126 Nev, Adv. Op, No, 17 (May 27, 2010) rendered its first published
8 opinion delineating the *significant differences and distinctions* between
9 a *statutory* claim for consumer fraud, versus one based on *common law fraud*;
10 and in so doing, adopted the majority position of a liberal interpretation with
11 respect to claims involving statutory consumer fraud, also known as deceptive
12 trade practices. The *Betsinger* Court succinctly stated and held:
13
14

15 NRS Chapter 598 is silent as to the plaintiff's burden of proof
16 for deceptive trade practices. See NRS 598.0903 - 0999. Thus,
17 while some deceptive trade practices defined in NRS Chapter
18 598 sound in fraud, see, e.g., NRS 598.0923(2), which, under
19 common law, must be proven by clear and convincing
20 evidence, see *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, we
21 cannot conclude that deceptive trade practices claims are
22 subject to a higher burden of proof absent a legislative directive
(internal citations omitted). This accords with the approach
taken by many other jurisdictions that have enacted similar
consumer protection statutes. (citations omitted).

23 In *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 666 P.2d 83, 87
24 *89 (1983), which the Nevada Supreme Court in *Betsinger* adopted, the court
25 stated and held that "consumer fraud" is a cause of action which is *separate and*
26 *distinct* from common law fraud.
27
28

1 NRS 41.600(2)(e) defines “consumer fraud” as a “deceptive trade practice
2 as defined in NRS 598.0915 to 598.0925, inclusive.” Thus, any violation of NRS
3 598.0915 to NRS 598.0925, inclusive, is consumer fraud *per se*. See *Ocnos v.*
4 *Nelson*, 2012 WL 3541194 (“Plaintiff has alleged a statutory violation of NRS
5 482.36661 which is inclusive of the cited provisions found within NRS
6 41.600(2)(c), and therefore, an act prohibited by NRS 482.36661 is *per se*
7 statutory consumer fraud.”). Here, Plaintiffs’ First Amended Complaint alleges
8 violations of NRS 598.0915(15) and NRS 598.0923(3). Both violations are
9 included within the definition of a “deceptive trade practice” in NRS 41.600(2)(e).
10 Thus, by alleging NDTPA violations, which are *per se* “consumer fraud” in
11 violation of NRS 41.600(2)(e), Plaintiffs have adequately plead their allegations
12 of “consumer fraud.”
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VII. CONCLUSION

Defendant clearly acted as a debt collector by sending letters that state Defendant may be considered a debt collector attempting to collect a debt, then demanding payment of alleged debts from Plaintiffs. Because Defendant acted as a debt collector, its attempts to collect the debts from Plaintiffs were subject to the FDCPA. Plaintiffs adequately plead each cause of action, both state and federal. Therefore, Plaintiffs respectfully request the Court deny Defendant's Motion in its entirety. Should the Court grant Defendant's Motion, in whole or in part, Plaintiffs respectfully request leave to amend the Complaint of any deficiencies.

Respectfully Submitted,
on September 25, 2014

Kazerouni Law Group

BY: /s/ DANNY HOREN
DANNY J. HOREN, ESQ.
NV Bar No. 13153
ATTORNEY FOR PLAINTIFFS

PROOF OF SERVICE

Pursuant to LR 5-1, I hereby certify that on the 25th day of September, 2014, service of the foregoing ***PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS*** was served via EC/CMF Electronic Filing System to Defendant's counsel, addressed as follows:

Counsel of Record	Phone/Email	Party
Eric R. Olsen, Esq. Gordon Silver 3960 Howard Hughes Pkwy., 9 th Floor Las Vegas, NV 89169	P: (702) 796-5555 eolsen@gordonsilver.com	Defendant

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is a true and correct statement and that this Certificate was executed on the aforementioned date above.

BY: /s/ DANNY HOREN
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NV Bar No. 13153
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